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No. 05-1411

IN THE

Supreme Court of the United States

FREDERIC JAMES MOORE,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where Moore retained private counsel using his own funds and then sought public funding to obtain the trial testimony of his DNA expert, did the Maryland Court of Appeals correctly hold that there was no violation of his constitutional rights because state-funded expert assistance was available to any criminal defendant who has satisfied the state procedural requirement of applying for representation by the Maryland Office of the Public Defender and showing a need for such assistance?

2. Is Moore precluded from raising before this Court a challenge to the waiver of his right to state-funded expert assistance where the question of the validity of his waiver was neither presented to nor addressed by Maryland courts?

Page

TABLE OF CONTENTS

QUESTIONS PRESENTED i

BRIEF IN OPPOSITION 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 9

SUMMARY 9

I. THERE IS NO NEED FOR REVIEW BY THIS COURT OF MOORE'S DEMAND FOR STATE-FUNDED EXPERT ASSISTANCE WHEN HE WAS REPRESENTED BY A PRIVATE ATTORNEY USING HIS OWN FUNDS 11

A. *Ake v. Oklahoma* does not establish a right to expert assistance under the circumstances of this case 11

Page

B. Maryland satisfies its constitutional obligations by granting indigent criminal defendants access to state funded expert assistance, provided the defendant complies with state procedural requirements by applying to the Office of the Public Defender 12

C. Because the Constitution permits states to adopt alternative methods for implementing access to ancillary services, there is no split among the states requiring resolution by this Court 16

D. Moore failed to establish a need for the requested trial testimony of his DNA expert 21

II. MOORE IS PRECLUDED FROM RAISING BEFORE THIS COURT A CHALLENGE TO THE WAIVER OF HIS RIGHT TO STATE FUNDED EXPERT ASSISTANCE WHERE THE QUESTION OF THE VALIDITY OF HIS WAIVER WAS NEITHER PRESENTED TO NOR ADDRESSED BY MARYLAND COURTS 23

CONCLUSION 25

APPENDIX ..... Resp. A1-A5

Page

TABLE OF AUTHORITIES

Ake v. Oklahoma, 470 U.S. 68 (1985) 9

Britt v. North Carolina, 404 U.S. 226 (1971) ... 14, 15

Bounds v. Smith, 430 U.S. 817 (1977) 15

Caldwell v. Mississippi, 472 U.S. 320 (1985) ... 12, 21

Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989) 15

English v. Missildine,
311 N.W.2d 292 (Iowa 1981) 17, 18, 19

Frederick James Moore v. State of Maryland,
390 Md. 343, 889 A.2d 325 (2005) 1

Granviel v. Lynaugh, 881 F.2d 185 (5th Cir. 1989),
cert. denied, 495 U.S. 963 (1990) 11

Harrison v. State, 644 N.E.2d 1243 (Ind. 1995) 12

Miller v. Smith, 115 F.3d 1136 (4th Cir.),
cert. denied, 522 U.S. 884 (1997) 13

Page

Moore v. State, 154 Md. App. 578, 841 A.2d 31 (2004) 1

Ross v. Moffitt, 417 U.S. 600 (1974) 14

State v. Brown, 134 P.3d 753 (N.M. 2006) 20

State v. Frank, 803 So. 2d 1 (La. 2001) 18, 19

State v. Jones, 707 So. 2d 975 (La. 1998) 18

State v. Miller, 337 Md. 71 , 651 A.2d 845 (1994) .. 13

State v. Punsalan, 133 P.3d 934 (Wa. 2006) 20

State v. Touchet, 642 So. 2d 1213 (La. 1994) ... 18, 19

Subin v. Ulmer, 36 P.3d 441 (N.M. Ct. App. 2001) . 20

United States v. Gonzales-Lopez, No. 05-352, 2006 WL 1725573 (U.S. June 26, 2006) 15

United States v. Williams, 504 U.S. 36 (1992) 24

Wheat v. United States, 486 U.S. 153 (1988) 15

Widdis v. Second Judicial District Court, 968 P.2d 1165 (Nev. 1998) 17, 19

Page

Constitutional & Statutory Provisions:

United States Constitution:

Amendment VI ..... 1, *passim*

Amendment XIV ..... 1, *passim*

Statutes:

28 U.S.C. § 1257 1

Annotated Code of Maryland:

Art. 27A, § 1 ..... 1, 13

Art. 27A, § 2 1

Art. 27A, § 4 1

Art. 27A, § 7 1

Rules:

Maryland Rules of Procedure:

Rule 1-325 ..... 1, 13

Rule 1-325 ..... 2, 24

Page

Rule 8-131 ..... 2, 24

Rule 8-303 24

Contents of Appendix:

Maryland Rule of Procedure,
Rule 8-131 ..... Resp. A1-A2

Maryland Rule of Procedure,
Rule 8-131 ..... Resp. A2-A5

BRIEF IN OPPOSITION

Respondent, the State of Maryland, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner, Frederick James Moore.

OPINIONS BELOW

The reported opinion of the Maryland Court of Appeals, *Frederick James Moore v. State of Maryland*, 390 Md. 343, 889 A.2d 325 (2005), is reproduced in the appendix to the petition for writ of certiorari at Pet. App. 1a-84a. The Court of Appeals' order denying reconsideration, including the mandate, is reproduced in the appendix to the petition at Pet. App. 1b-3b. The reported opinion of the Maryland Court of Special Appeals, *Moore v. State*, 154 Md. App. 578, 841 A.2d 31 (2004), is reproduced in the appendix to the petition at Pet. App. 1c-30c. The transcript of pertinent portions of the proceeding before the Circuit Court for Howard County, Maryland, denying requested relief, is reproduced in the appendix to the petition at Pet. App. 1d-9d.

STATEMENT OF JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution, Sections 1, 2, 4 and 7 of Article 27A of the Maryland Code, and Maryland Rule 1-325(b) are

reproduced in the appendix to the petition at App. 1e-13e. Maryland Rules 8-131 and 8-303 are reproduced in the Appendix herein.

STATEMENT OF THE CASE

On January 4, 2001, Petitioner Moore and his co-defendant, Scott Jory Brill, were indicted for the first degree murder of fourteen-year-old Ashley Nicole Mason. (Pet. App. 3a-4a, 1c). Mason's body was found in the woods near a Pizza Hut parking lot. She had been stabbed multiple times and strangled. (Pet. App. 3a, 3c). Moore and Brill were tried separately. Moore was represented throughout his trial by an attorney he retained using money he had received from the settlement of a personal injury lawsuit. (Pet. App. 5a n.3).

Moore's Pretrial Request for Public Funds

Prior to trial, the State hired Cellmark Diagnostics, Inc. to conduct DNA analysis of evidence related to Mason's murder. (Pet. App. 1a, 3c). Moore then retained his own DNA expert, J. Thomas McClintock, Ph.D., paying him $1,000 obtained from Moore's mother, to review the Cellmark findings. (Pet. App. 5a). Dr. McClintock provided a preliminary analysis of the Cellmark procedures and results to the defense, but would not testify at trial without additional payment. (Pet. App. 6a, 3c). Moore filed "Defendant's Motion to Have the Circuit Court for Howard County or the Office of the Public Defender Provide Financial Aid to the Defendant for the Purpose of Providing a DNA Expert to Testify for the

Defendant." (Pet. App. 5a). Moore did not allege any specific errors in Cellmark's DNA analysis, but wanted his own expert to explain to the jury the general limitations of, or potential for mistakes in, DNA testing. (Pet. App. 6a-7a). In Moore's view, the expert "would be extremely important to help explain to the jury that there are two sides to every DNA test result." (Pet. App. 6a).

Moore declared in support of his motion that he was indigent. He presented no evidence establishing the amount of money he had received in the personal injury settlement, nor did he establish how much money had been set aside for his defense or how much money remained available from the settlement for that purpose. (Pet. App. 4c). The Court of Appeals declared that, for the purposes of the pretrial motion, Moore was conceded to be indigent. (Pet. App. 1a).[1]

At a January 14, 2002, hearing on the motion, a representative of the Office of the Public Defender [O.P.D.] testified that the Office policy was not to make funds available for private counsel cases. (Pet. App. 9a). The trial court also consulted with the administrative judge for Howard County and determined "that there are no Court funds dedicated or available to provide in general

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[1] Maryland did not take a position prior to trial on Moore's request for funds provided by the Office of the Public Defender or the Circuit Court for Howard County, instead deferring to the trial court. (Pet. App. 9a). On appeal, however, the State argued "that Moore bore the burden of establishing indigency but failed to do so." (Pet. App. 16a).

for experts in cases where an individual will have private counsel and, specifically, there are not funds available – Court funds available to provide for the expert in this case." (*Id.*). After confirming that Moore's counsel was privately retained, the court added: "And I would not direct the Office of the Public Defender to provide fees in this case since they are not counsel of record in the case. So, I'll specifically deny your request." (Pet. App. 10a).

The Evidence at Trial

The State presented evidence that, on the night before her body was discovered, Ashley Mason had accompanied Moore and his co-defendant, Brill, to the house of Martise Stewart. (Pet. App. 12a, 2c). There, an altercation developed, first between Mason and Brill and then between Mason and both men. (Pet. App. 12a). Stewart testified that Brill punched Mason in the face and Moore exclaimed: "'Just go ahead and hit the bitch, man. Hit her.'" (*Id.*). Stewart went upstairs at this point, but heard a loud commotion continue. He "later saw Mason leave with Moore and Brill." (*Id.*).

Moore and Brill returned to Stewart's house a few hours later. Moore's "butter Timberland" boots and pants legs were smeared with blood, and the "do-rag" or head scarf that Moore had been wearing when he left the house was missing. (*Id.*). Brill had lacerations on both arms. Moore and Brill described the killing to Stewart. The Court of Appeals summarized Stewart's testimony on this point, saying:

> Brill "indicated they killed her," and said that Mason had caused his lacerations by scratching him as he choked her. Moore "said they both had killed her and they put her behind the Pizza Hut . . . . Moore also said that they had used a buck knife and that "he threw the knife and he couldn't find it." Moore told Stewart that "it was almost like daylight outside, but he said he would've definitely recovered the weapon, but he couldn't like, find where he threw it at."

(Pet. App. 13a)(footnote omitted).

A bloody knife was discovered near the Pizza Hut, and two "do-rags" were recovered from the bushes near Mason's body. (Pet. App. 10a). Scott Brill's sister, Crystal Brill, identified photographs of the knife as those of a knife she had given Moore, adding that Moore carried the knife in his pocket. (Pet. App. 12a-13a). Crystal Brill also testified that the two "do-rags" found near the victim's body belonged to Moore and that he wore the two simultaneously because one had a rip. (Pet. App. 13a). She confirmed that Moore wore "butter Timberland" boots before the murder, but stated that she never saw him wear these boots after the victim was killed. In addition, Crystal Brill testified that she observed Moore wiping down portions of Scott Brill's car after the murder. (*Id.*).

Danielle Ritter, Moore's cousin and the mother of Scott Brill's child, testified that Moore told her "what had happened" some weeks after the murder. (*Id.*). On direct examination, "[a]fter some prodding by the State, Ritter

testified that Moore had said 'we' killed her." (Pet. App. 14a). On cross-examination, Ritter agreed that Moore never said who stabbed the victim. (*Id.*).

The State presented evidence that DNA analysis was performed by the Cellmark laboratory on blood recovered from the Pizza Hut parking lot, the victim's underwear, the "do-rags" recovered near the victim's body, the knife discovered near the Pizza Hut, clippings from the victim's fingernails, and swabs taken from her ankles, vagina and anus. (Pet. App. 10a-11a). The Court of Appeals summarized the testimony of Dr. Robin Cotton, forensic lab director for Cellmark:

> DNA on each of the "do-rags" was consistent with Frederick Moore's at each of the nine loci tested. Within Moore's racial category, only one individual in 79 billion could be expected to exhibit that particular DNA profile. DNA obtained from the inside of the knife was consistent with that of Ashley Mason; DNA obtained from the outside of the knife came from multiple sources. Moore was identified as a possible contributor at six of the nine loci; the outside of the knife was inconclusive as to Brill. The fingernail clippings from Ashley Mason's right and left hands both revealed a mixture of DNA, with Ashley Mason identified as the primary source. There were also indications of a male as a possible source, but no further conclusion could be made. Swabs from Mason's left ankle showed a mixture of DNA, with no primary source. Brill was included as a possible

> source, while Moore was excluded as a source. Swabs from Mason's right ankle also revealed a mixture of DNA, with Mason herself as the primary source. The secondary DNA was inconclusive as to Moore and as to Brill, with both men included at four of the nine loci.

(Pet. App. 11a). Although Moore was not charged with any sexual offense, the Court of Appeals also summarized Dr. Cotton's testimony regarding the results of the DNA testing of samples taken from the victim's vagina and anus and from her underpants:

> The vaginal swabs yielded both sperm fractions and non-sperm fractions. The sperm fractions indicated the presence of male DNA, but no further conclusions could be drawn. Sperm fractions recovered from the anal swabs revealed that Moore could be included as a possible source at five of the nine loci; no conclusion could be reached on the remaining four loci. A comparison with Scott Brill's DNA was inconclusive. Sperm fractions recovered from Mason's underwear revealed a mixture of at least two sources. Although no primary source was determined, Frederick Moore was included as a possible contributor at all nine loci. Within Moore's racial category, approximately one individual in 40,000 could have contributed these sperm fractions.

(Pet. App. 11a-12a)(footnote omitted).

Moore did not testify at trial. Before the jury, Moore's counsel acknowledged that Moore was present during the killing, but argued that Brill alone committed the murder. (Pet. App. 10a).

On February 1, 2002, a jury convicted Moore of first degree murder. He was sentenced to life imprisonment on August 21, 2002. (Pet. App. 1c-2c).

The Decisions on Appeal

The Court of Special Appeals of Maryland affirmed the judgment on direct appeal. (Pet. App. 1c-30c). The Court of Appeals of Maryland granted Moore's petition for writ of certiorari and likewise affirmed. The Court of Appeals agreed with Moore that the scope of the right to expert assistance announced in *Ake v. Oklahoma*, 470 U.S. 68 (1985), was not restricted to capital cases or to psychiatric experts. (Pet. App. 21a-26a). To obtain expert assistance using public funds, Maryland's highest court stated, a defendant must show "that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." (Pet. App. at 27a-29a). Upon timely request, the defendant is entitled to an *ex parte* hearing to determine whether he has satisfied this burden. (Pet. App. 32a).

The Court of Appeals held that, as a matter of Maryland statutory law, representation by the Maryland Office of the Public Defender is not severable from ancillary services provided pursuant to statute. (Pet. App.

33a-36a). Addressing Moore's due process, equal protection and Sixth Amendment right to counsel claims, the court held that the State had satisfied its constitutional obligations by establishing the Office of the Public Defender, "making expert services available to clients of that Office, and requiring that, in order for an indigent to receive State-funded expert services, the defendant *must* seek representation by O.P.D." (Pet. App. 36a).

In his briefs and argument before the Court of Appeals, Moore presented no question regarding the validity of his waiver of his alleged right to a state-funded expert. (Pet. App. 1a-2a: listing questions presented by Moore). Despite his failure properly to present the claim, however, after the Court of Appeals had affirmed the judgment, Moore moved for reconsideration, challenging the validity of his waiver of his constitutional right to expert assistance and asking the court to address the issue. By Order issued February 3, 2006, the Court of Appeals summarily denied the motion for reconsideration. (Pet. App. 1b).

REASONS FOR DENYING THE WRIT

SUMMARY

There are several reasons why certiorari should not be granted to address Moore's claim that his Fourteenth Amendment rights to due process and equal protection and his Sixth Amendment right to counsel entitled him to state-funded expert assistance, notwithstanding that he was represented by privately retained counsel. First, a criminal defendant's right to expert assistance, established in *Ake*

v. Oklahoma, 470 U.S. 68 (1985), does not apply to cases like that at bar, where DNA testing was performed and the methodology of the scientific analysis was well established and objective. Second, the Court of Appeals correctly determined that Maryland had satisfied its constitutional obligations by making access to State-funded expert assistance contingent upon satisfaction of the state procedural requirement of application to the O.P.D. Third, the Constitution permits states to adopt alternative methods for implementing access to ancillary services. Thus, there is no split among the states requiring resolution by this Court. Finally, and in any event, Moore failed to establish a need for the requested assistance.

Moore's second claim, challenging the validity of his waiver of his alleged right to expert assistance under *Ake*, was not properly presented to nor addressed by Maryland courts. Having failed to comply with Maryland's requirements for presentation of the claim, Moore should not be granted review of the claim by this Court.

I.

THERE IS NO NEED FOR REVIEW BY THIS COURT OF MOORE'S DEMAND FOR STATE-FUNDED EXPERT ASSISTANCE WHEN HE WAS REPRESENTED BY A PRIVATE ATTORNEY USING HIS OWN FUNDS.

A. *Ake v. Oklahoma* does not establish a right to expert assistance under the circumstances of this case.

In *Ake v. Oklahoma*, this Court held as a matter of due process

> that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

470 U.S. at 83. The Maryland Court of Appeals erred in expanding the scope of *Ake*.

Ake, who was facing capital murder charges, attempted to raise an insanity defense, yet "*there was no expert testimony for either side on [his] sanity at the time of the offense.*" 470 U.S. at 72 (emphasis in original). By contrast, here, DNA analysis was performed. *See Granviel v. Lynaugh*, 881 F.2d 185, 191 (5th Cir. 1989)(holding that

defendant's Fourteenth Amendment right was satisfied where opinion and testimony of court-appointed psychiatrist was available to both sides), *cert. denied*, 495 U.S. 963 (1990).

This case is also unlike *Ake* in that Moore was not facing a death sentence and psychiatric evaluation was not involved. *Ake* should not be applied to the case at bar, where the methodology of the DNA testing used by Cellmark is well established and much less subjective than a psychiatric evaluation. *See Harrison v. State*, 644 N.E.2d 1243, 1252-53 (Ind. 1995)(upholding denial of DNA expert to defense at public expense, provided analysis was performed by neutral expert, because DNA analysis involved precise physical measurements, the results of which were not subject to dispute); *cf. Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985)(leaving open question of whether due process requires states to provide non-psychiatric scientific experts under appropriate showing of need). Even if *Ake*'s analysis may be applied to the trial testimony of a DNA expert, however, the Court of Appeals correctly determined that there was no due process or other constitutional violation in this case.

B. Maryland satisfies its constitutional obligations by granting indigent criminal defendants access to state funded expert assistance, provided the defendant complies with state procedural requirements by applying to the Office of the Public Defender.

As Maryland's Court of Appeals observed, "[i]t is clear that *Ake* does not mandate handing over the State's

checkbook to indigent defendants and their attorneys." (Pet. App. 27a). Through the Office of the Public Defender, Maryland not only provides legal representation for any criminal defendant eligible for its services; the State also provides such defendants any "related necessary services." Md. Code Ann., Art. 27A, § 1 (2003 Repl. Vol.); *see also State v. Miller*, 337 Md. 71, 77-78, 651 A.2d 845, 847-48 (1994); *accord Miller v. Smith*, 115 F.3d 1136, 1141-43 (4th Cir.)(en banc)(holding, on habeas corpus review, that Maryland did not violate Sixth or Fourteenth Amendments in denying defendant, who was represented by *pro bono* attorney, free trial transcript for use on appeal; stating that Miller could have received representation by O.P.D. had he applied for same and that Maryland did not deny him meaningful appellate review by requiring in Md. Rule 1-325(b) that indigent defendant must first apply for legal representation with O.P.D. as prerequisite to obtaining free transcript), *cert. denicd*, 522 U.S. 884 (1997). In this case, the Court of Appeals, construing Maryland's Public Defender Act, held as a matter of state law that representation by the O.P.D. is not severable from access to ancillary services. (Pet. App. 33a-36a). Moore insists that his claim should be resolved by concluding that Article 27A "permits, and the Constitution requires, that he be granted the requested funding while proceeding with retained counsel." (Pet. for Cert. at 22 n.11). To the contrary, the Court of Appeals correctly held that Maryland had satisfied its constitutional obligations by making ancillary services available to any indigent criminal defendant who applied for representation by the Office of the Public Defender.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a state, upon request, to provide indigent criminal defendants with the "basic tools of an adequate defense . . . when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). The state is not required to purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, however; fundamental fairness requires only that the state not deny indigent defendants "an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

In *Ake*, this Court held that, where a defendant's sanity at the time of an offense will be a significant factor at trial, the State must assure the defendant access to a competent psychiatrist to assist in his defense, but the Court added:

> This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision how to implement this right.

470 U.S. at 83.

This Court has also recognized that states may create reasonable alternative systems in satisfaction of a criminal

defendant's right to equal protection. *See Bounds v. Smith*, 430 U.S. 817, 830-31 (1977)(noting that, while adequate law libraries are one constitutionally acceptable method of assuring meaningful access to the courts in accordance with equal protection guarantees, alternative means may be adopted to achieve this goal); *Britt v. North Carolina*, 404 U.S. at 229-30 (holding that equal protection concerns were satisfied where accused did not receive transcript of first trial, but where informal alternative was available). The Court of Appeals correctly determined that there is no equal protection violation where a defendant is denied access to certain trial resources because of his own failure to comply with reasonable state procedural requirements. (Pet. App. 39a).

With respect to Moore's claim that the Court of Appeals improperly circumscribed his Sixth Amendment right to counsel of his choice as described in *Wheat v. United States*, 486 U.S. 153 (1988), this Court has remarked that "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." *Wheat*, 486 U.S. at 159. While a defendant who does not require appointed counsel has the right to choose who will represent him, *United States v. Gonzales-Lopez*, No. 05-352, 2006 WL 1725573 at *3 (U.S. June 26, 2006), it is firmly established that an indigent defendant does not have a right to insist on representation by the particular counsel of his choice. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989); *Wheat*, 486 U.S. at 159. A similar analysis should apply to defendants who are seeking money for expert assistance from the public coffers: defendants cannot insist upon

counsel of their choice while demanding state-funded expert assistance.

The Court of Appeals correctly concluded that

> [a]ssuming *arguendo* that the assistance of a DNA expert was necessary to an adequate defense in the instant case, the State did not deny Moore that assistance. Rather, expert assistance was available to him so long as he complied with the procedural requirement that he apply for legal representation through the O.P.D. Imposing this requirement on Moore did not violate his constitutional rights.

(Pet. App. 41a-42a). As the court stated: "Indigent defendants may utilize the O.P.D.'s complete 'package' of services, or forgo them entirely. While such defendants may face difficult choices, the Constitution does not bar the State of Maryland from requiring them to choose between counsel of their choice and ancillary services provided by the O.P.D." (Pet. App. 41a).

C. Because the Constitution permits states to adopt alternative methods for implementing access to ancillary services, there is no split among the states requiring resolution by this Court.

Moore suggests that certiorari should be granted to resolve an evenly divided split among state courts of last resort. (Pet. for Cert. at 12). In his initial petition, he discusses three states–Iowa, Louisiana and Nevada–in which the courts of last resort have held as a matter of

federal constitutional law that indigent defendants are entitled to public funding for expert assistance when they are not represented by the state Public Defender, and contrasts the decisions in these three states with contrary holdings in Kentucky, Delaware and Maryland. (Pet. for Cert. at 15-20).

Because the Constitution permits the states to adopt alternative methods for implementing access to ancillary services, there is no split requiring resolution by this Court. Furthermore, the opinions from Iowa, Louisiana and Nevada contain little, if any, constitutional analysis. In *English v. Missildine*, 311 N.W.2d 292, 294 (Iowa 1981), the Supreme Court of Iowa simply declared that "[t]he Constitution does not limit [the Sixth Amendment right to counsel] to defendants represented by appointed or assigned counsel." With virtually no additional analysis of the constitutional claim, the court declared that "the determinative question is the defendant's indigency" and stated that "[t]he fact that a third person retained private counsel for plaintiff does not by itself affect his status as an indigent." *Id.* The court did reject the State's contention that the defendant's remedy was to accept court appointed or assigned counsel; however, the court did so based on the court's view that such a requirement "would impose an unreasonable and unnecessary additional burden on the public treasury." *Id.* At bottom, this is a policy determination, properly made by the state legislature.

In *Widdis v. Second Judicial District Court*, 968 P.2d 1165, 1168 (Nev. 1998), the Supreme Court of Nevada

merely adopted the "analytical framework" of *English v. Missildine*. Like the *English* court, the Nevada court then went on to discuss policy rationales, concluding that "a contrary rule would have a greater negative impact on scarce public resources by creating disincentives for defendants to seek private representation at their own expense." *Id.* at 1229. Again, this policy determination is best made by the legislative body of each state.

State v. Touchet, 642 So. 2d 1213, 1213-14 (La. 1994), addressed "whether and to what extent indigent defendants are entitled to ex parte hearings on their motion for state funding of expert witness services." In answering this question, the Supreme Court of Louisiana looked to due process principles and set forth the test for determining when an indigent defendant should be granted such services. *Id.* at 1214-17.[2] Later, in *State v. Jones*, 707 So. 2d 975, 977-78 (La. 1998), the court determined that a defendant who had private counsel provided by a collateral source "may still be entitled to State funding for auxilary services provided he can meet the requirements of *Touchet*." *Jones*, in turn, was cited in *State v. Frank*, 803 So. 2d 1, 8-11 (La. 2001), where the court reversed a

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[2] The Louisiana court held in *Touchet* that "for an indigent defendant to be granted the services of an expert at the expense of the state, he must establish that there exists a reasonable probability both that an expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamentally unfair trial." 642 So. 2d at 1216. This is the same formulation adopted by Maryland's Court of Appeals. (Pet. App. 27a-29a).

lower court finding that the defendant was not indigent and then considered what prejudice, if any, the defendant had suffered from the lack of additional expert assistance.

In none of these cases did a defendant retain private counsel using his own funds. *See English v. Missildine*, 311 N.W.2d at 293 (defendant's mother retained private counsel); *State v. Frank*, 803 So. 2d at 6 (defendant's mother retained counsel); *State v. Jones*, 707 So. 2d at 976 (defendant's father paid second attorney to join public defender as counsel); *Widdis v. State*, 968 P.2d at 1166 (family members paid for private counsel).[3] Indeed, in *English v. Missildine*, the Supreme Court of Iowa observed that this was "not a case where an accused has rendered himself impecunious by an unreasonable expenditure of funds to retain private counsel. Nor is it a case where counsel's fee should reasonably be expected to cover investigative services." 311 N.W.2d at 294. To like effect, in *Jones*, after stating that the a defendant's indigency was the determinative question, not whether the defendant had derived any assistance from collateral sources, the Supreme Court of Louisiana added: "Of course, a defendant who retains counsel at his own expense has not derived that benefit from a collateral source and therefore his indigent status must be questioned." 707 So. 2d at 977. In short, none of the cases from Iowa, Nevada or Louisiana is directly on point with the circumstances in the case at bar.

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[3] In *State v. Touchet*, 642 So. 2d at 1213-14, no information is provided regarding the source of funding for defendant's counsel's.

The cases from Washington and New Mexico, which are discussed in Moore's supplemental petition, are also inapposite. In *State v. Punsalan*, 133 P.3d 934, 935 (Wa. 2006), the defendant's mother hired a private attorney on his behalf; that attorney then sought public funds through the King County Office of the Public Defender to retain a forensic pathologist. The Supreme Court of Washington resolved Punsalan's claim as a matter of state law, looking to the plain language of the pertinent statute to hold that indigent criminal defendants represented by private counsel were entitled to state-funded expert assistance. *Id.* at 935-36. The case does not support Moore's assertion, (Supp. Pet. at 1), that there is a "growing divide among state courts" on a federal question.

In *State v. Brown*, 134 P.3d 753, 758 (N.M. 2006), the Supreme Court of New Mexico considered whether the right of indigent defendants to expert witnesses includes the right to funding to pay for those witnesses when the defendant is represented by a *pro bono* attorney. Again, the case is not on point. The New Mexico court expressly distinguished the circumstances of the case before it from those presented in *Subin v. Ulmer*, 36 P.3d 441 (N.M. Ct. App. 2001), on the ground that Brown's counsel served *pro bono*, while *Subin* "addressed the situation in which the defendant, although indigent, nonetheless retained *paid* private counsel and was therefore not entitled to receive" funding from the state public defender's office. 134 P.3d at 759. The court held "that constitutional considerations, together with the particular statutory framework in New Mexico and the important policy interests at stake, mandate that a defendant, established as indigent and

represented by *pro bono* counsel, be afforded the same access to expert witness funding as other defendants represented by the [public defender's office]." *Id.* at 760-61. Moore is not represented by *pro bono* counsel. Consequently, his case falls outside the ambit of the holding in *Brown*. Neither *Brown* nor *Punsalan* supports Moore's assertion of a need for review by this Court.

D. Moore failed to establish a need for the requested trial testimony of his DNA expert.

Unparticularized assertions of a need for expert assistance will not support a federal constitutional claim. *Caldwell v. Mississippi*, 472 U.S. at 323 n.1. Based on its holding that Moore had not satisfied Maryland's procedural requirement for state-funded expert assistance by applying to the O.P.D., the Court of Appeals did not reach the question of whether he had made the required showing that the services he requested were in fact necessary to an adequate defense. (Pet. App. 37a n.8). The record establishes, however, that Moore failed to demonstrate, as would be required in Maryland, that there was a reasonable probability "both that an expert would be of assistance to [his] defense and that the denial of expert assistance would result in a fundamentally unfair trial." (Pet. App. 28a-29a).[4]

[4] The record fails to demonstrate even that Moore was indigent: he did not indicate how much money had been paid for his defense or whether that sum might reasonably be expected to encompass the money necessary for expert witnesses. (Pet. App. 4c).

Moore had already obtained, at his own expense, an independent review of the DNA analysis conducted by Cellmark in this case and he had the benefit of this review in conducting his cross-examination of Dr. Cotton. Moore did not request additional testing, nor did he allege any specific errors in the analysis; instead, he merely sought his expert's trial testimony to explain general ways in which DNA testing may be flawed. (Pet. App. 5a-7a). Such general "possibilities" were plainly insufficient to establish a particularized need for testimony from a defense expert in this case, particularly where the defense expert had already examined Cellmark's results.

Moreover, this is not a case where DNA evidence was central to the State's case. Although as Moore observes, (Pet. for Cert. at 5), Dr. Cotton's testimony was more extensive than that of any other State witness, the length of her testimony reflects only the number of samples tested and the mixed results obtained on some of the samples, not the importance of the DNA evidence. The DNA evidence was essentially corroborative of other evidence presented by the State. It was certainly no surprise that the blood at the crime scene was that of the victim. Moore, through counsel, admitted his presence during the killing. (Pet. App. 10a). Moreover, compelling evidence apart from DNA established that the do-rags and knife found near the scene belonged to Moore. Thus, again, it was no surprise that his DNA appeared on these items. Moore was not charged with any sexual offense against the victim. Therefore, insofar as the DNA evidence indicated that Moore could be included as a source of the DNA on the victim's anal swabs and panties, such evidence had little,

if any, probative value regarding whether Moore participated in the murder.

In sum, Moore failed to establish any constitutional violation by the denial of his motion for public funds to obtain the trial testimony of his DNA expert. For all the reasons discussed above, Moore's request for certiorari review of his first claim should be denied.

II.

MOORE IS PRECLUDED FROM RAISING BEFORE THIS COURT A CHALLENGE TO THE WAIVER OF HIS RIGHT TO STATE FUNDED EXPERT ASSISTANCE WHERE THE QUESTION OF THE VALIDITY OF HIS WAIVER WAS NEITHER PRESENTED TO NOR ADDRESSED BY MARYLAND COURTS.

Moore's second question presented, regarding the validity of the waiver of his claimed constitutional right to expert assistance, was not properly presented to nor addressed by Maryland courts. Maryland does not concede either that such a waiver was necessary or that the facts of this case would not demonstrate a valid waiver. But, in any event, this Court should decline to review Moore's challenge to his waiver because he did not properly present this issue to state courts.

To support his assertion that he raised the claim before the Court of Appeals, Moore cites to page 34 of his brief

before that court. (Pet. for Cert. at 8). At page 34, Moore declared that the "rule" developed in Delaware would guarantee a knowing and intelligent waiver of the right to state funded expert assistance. Moore Ct. App. Br. 34. He concluded by stating that "[i]f [the Court of Appeals] should adopt such a rule, [he] must be granted a new trial and given the opportunity for the first time to exercise the counsel substitution option so he may proceed with a public defender and the necessary experts." *Id.* The Court of Appeals did not adopt what Moore termed "the Delaware Rule." Thus, the condition precedent for Moore's request was not satisfied. Even if this were not so, however, Moore's remarks on page 34 were inadequate to present his current claim.

Maryland's Court of Appeals generally will not consider an issue that was not raised or decided in the lower state courts. Md. Rule 8-131(a). In addition, Maryland Rule 8-303(b)(1)(F) requires that a petition for writ of certiorari contain the questions presented for review. Moore presented three questions to the Court of Appeals; none concerned the validity of any waiver. (Pet. App. 1a-2a: quoting questions presented by Moore for review). When Moore did at last present the waiver claim, in a motion for reconsideration of the Court of Appeals' decision affirming the judgment, the court summarily denied the motion, with no decision on the merits. (Pet. App. 1b).

This Court does not sit to resolve questions that were neither presented to nor passed on by the lower courts. *See United States v. Williams*, 504 U.S. 36, 44 n.5 (1992).

Under the circumstances here, where Moore failed to comply with Maryland's procedural rules governing preservation and presentation of his claim, this Court should decline to issue a writ of certiorari to review Moore's challenge to the validity of his waiver

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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July 7, 2006

APPENDIX

TABLE OF CONTENTS

Page

Maryland Rule of Procedure,
Rule 8-131 (2006 Vol.) ..... Resp. A1-A2

Maryland Rule of Procedure,
Rule 8-303 (2006 Vol.) ..... Resp. A2-A5

Rule 8-131. Scope of Review.

(a) *Generally.* The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) *In Court of Appeals — Additional limitations.* (1) Prior appellate decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

(2) No prior appellate decision. Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider

those issues that would have been cognizable by the Court of Special Appeals.

(c) *Action tried without a jury.* When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

(d) *Interlocutory order.* On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

(e) *Order denying motion to dismiss.* An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

(2006 Rules)

Rule 8-303. Petition for writ of certiorari — procedure.

(a) *Filing.* A petition for a writ of certiorari, together with seven legible copies, shall be filed with the Clerk of the Court of Appeals. The petition shall be accompanied by the filing fee prescribed pursuant to Code, Courts Article, § 7-102 unless the fee has been waived by an order of court or unless the petitioner is represented by (1) the Public Defender's Office, (2) an attorney assigned by Legal Aid Bureau, Inc., or (3) an attorney assigned by

any other legal services organization that accepts as clients only those persons meeting the financial eligibility criteria established by the Federal Legal Services Corporation or other appropriate governmental agency.

(b) *Petition.* (1) Contents. The petition shall present accurately, briefly, and clearly whatever is essential to a ready and adequate understanding of the points requiring consideration. Except with the permission of the Court of Appeals, a petition shall not exceed 25 pages. It shall contain the following information:

(A) A reference to the action in the lower court by name and docket number;

(B) A statement whether the case has been decided by the Court of Special Appeals;

(C) If the case is then pending in the Court of Special Appeals, a statement whether briefs have been filed in that Court or the date briefs are due, if known;

(D) A statement whether the judgment of the circuit court has adjudicated all claims in the action in their entirety, and the rights and liabilities of all parties to the action;

(E) The date of the judgment sought to be reviewed and the date of any mandate of the Court of Special Appeals;

(F) The questions presented for review;

(G) A reference to pertinent constitutional provisions, statutes, ordinances, or regulations;

(H) A concise statement of the facts material to the consideration of the questions presented; and

(I) A concise argument in support of the petition.

(2) Documents. A copy of each of the following documents shall be submitted with the petition at the time it is filed:

(A) The docket entry evidencing the judgment of the circuit court;

(B) Any opinion of the circuit court;

(C) Any written order issued under Rule 2-602(b);

(D) If the case has not been decided by the Court of Special Appeals, all briefs that have been filed in the Court of Special Appeals; and

(E) Any opinion of the Court of Special Appeals.

(3) Where documents unavailable. If a document required by subsection (b)(2) of this Rule is unavailable, the petitioner shall state the reason for the unavailability. If a document required to be submitted with the petition becomes available after the petition is filed but before it has been acted upon, the petitioner shall file it as a supplement to the petition as soon as it becomes available.

(4) Previously served documents. Copies of any brief or opinion previously served upon or furnished to another party need not be served upon that party.

(c) *Sanction.* Failure to comply with section (b) of this Rule is a sufficient reason for denying the petition.

(d) *Answer.* Within 15 days after service of the petition, any other party may file an original and seven copies of an answer to the petition stating why the writ should be denied.

(e) *Stay of judgment of Court of Special Appeals or of a Circuit Court.* Upon the filing of a petition for a

writ of certiorari, or upon issuing a writ on its own motion, the Court of Appeals may stay the issuance, enforcement, or execution of a mandate of the Court of Special Appeals or the enforcement or execution of a judgment of a circuit court.

(f) *Disposition.* On review of the petition and any answer, the Court, unless otherwise ordered, shall grant or deny the petition without the submission of briefs or the hearing of argument. If the petition is granted, the Court shall:

(1) direct further proceedings in the Court of Appeals;

(2) dismiss the appeal pursuant to Rule 8-602;

(3) affirm the judgment of the lower court;

(4) vacate or reverse the judgment of the lower court;

(5) modify the judgment of the lower court;

(6) remand the action to the lower court for further proceedings pursuant to Rule 8-604 (d); or

(7) an appropriate combination of the above.

(g) *Duty of clerk.* The Clerk of the Court of Appeals shall send a copy of the order disposing of the petition to the clerk of the lower court. If the order directs issuance of a writ of certiorari, the Clerk shall issue the writ to the lower court.

(2006 Rules)